

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications
and Energy on its own Motion into the Appropriate Pricing,
based upon Total Element Long-Run Incremental Costs,
for Unbundled Network Elements and Combinations of
Unbundled Network Elements, and the Appropriate Avoided
Cost Discount for Verizon New England, Inc.
d/b/a Verizon Massachusetts' Resale Services in the
Commonwealth of Massachusetts

D.T.E. 01-20

**RESPONSE TO COVAD OBJECTION
TO VERIZON MA'S MOTION TO FILE SUPPLEMENTAL TESTIMONY**

On January 22, 2002, Covad Communications Company ("Covad") requested that portions of the record in D.T.E. 98-57 (Phase III) be incorporated by reference. By motion dated February 6, 2002, Verizon Massachusetts ("Verizon MA") did not object to the request, but also moved the Department to incorporate by reference additional portions of D.T.E. 98-57 (Phase III). In addition, Verizon MA requested leave to file supplemental testimony in order to update the record compiled in 2000 in D.T.E. 98-57 (Phase III) on the issues identified by Covad. Covad did not object to Verizon MA's request to incorporate further portions of the record in D.T.E. 98-57 (Phase III), but objected to the motion to file supplemental testimony (Tr. 16, at 3636-3542). Verizon MA hereby responds briefly to Covad's objection.

Although the Department's rules at 220 C.M.R. 1.10(3) permit parties to include evidence from one Department proceeding in the record of another case, it cannot be accomplished in such a way as to violate the statutory rights of other parties. Both applicable statutory provisions and Department precedent require that Verizon MA be permitted to present supplemental testimony in this proceeding to address issues that were raised, for the first time, in

Covad's request to incorporate by reference portions of the record assembled in D.T.E. 98-57

(Phase III). The Massachusetts Administrative Procedures Act states that:

Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument.... In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues

G.L. c. 30A § 1. Department precedent provides that only when a party in a case calls into question an element in an initial filing of a regulated company does the company have sufficient notice that the issue is being challenged. *NYNEX*, D.P.U. 94-50, at 287-288 (1995) and cases cited therein. Once such notice is received, parties have the statutory right "to prepare and present evidence and argument respecting the issues." G.L. c. 30, § 1. In this case, until Covad incorporated by reference portions of the record in D.T.E. 98-57 (Phase III), Verizon MA had no notice of the new issues that Covad wished to litigate in this case.

Before the Covad motion of January 22, 2002, only the limited issue of "loop conditioning" relating to D.T.E. 98-57 (Phase III) had been alluded to in Mr. Stacy's rebuttal testimony (Exh. CC-1; Tr. 3, at 365). This issue was addressed by Verizon MA's witness, Mr. White (Tr. 3, at 441-454). However, Covad subsequently identified a large number of additional issues in its January 22nd request to incorporate by reference, and it was only at that time that

Verizon MA had notice such issues were being raised in this case.¹ Because Verizon MA was put on notice by Covad of “issues involved” in the case in the January 22nd pleading, good cause and a statutory right exists for Verizon MA to provide evidence to address the issues.

Under the procedural schedule adopted by the Department in this proceeding, parties had ample time to identify issues through the filing of testimony during earlier portions of the case. According to Covad’s strained reading of the Department’s regulations on incorporation by reference, parties have the ability on the final day of hearings to fill the evidentiary record of one proceeding with information developed in another case (Tr. 17, at 3538). This is not only fundamentally unfair, but clearly runs afoul of applicable state law. G.L. c. 30A, § 1. Accordingly, Verizon MA has the right to present supplemental testimony and evidence on the issues addressed in those portions of D.T.E. 98-57 (Phase III) that Covad has incorporated by reference in this case.

Verizon MA recognizes that the Department desires to bring this proceeding to a timely conclusion and that an aggressive briefing schedule has been established. Rather than suggest that the briefing schedule be altered in order to complete the record on the issues raised by Covad in its request to incorporate by reference, Verizon MA suggests that those issues be put on a separate “track.” Verizon MA will file its supplemental testimony on Wednesday,

¹ As described in Verizon MA’s motion requesting to file supplemental testimony, Verizon MA pointed out that the following issues from D.T.E. 98-57 (Phase III) were included in the Covad request to incorporate by reference: (1) recurring rates for line sharing loop; (2) retroactive OSS charge; (3) service order charge; (4) service connection charge; (5) cross connection service activation charge; (6) POT bay splitter termination charge; (7) service access connection/tie cable charge; (8) splitter equipment support charge; (9) maintenance of splitter charge/splitter administration and support charge; (10) application-augment and engineering implementation fees for cable augment; (11) splitter installation for cable augment; (12) service connection charge for cable augment; and (13) cooperative testing charge.

February 13, 2002, and then the Hearing Officer can establish appropriate dates for any discovery and rebuttal testimony on the scope of the supplemental testimony.²

For the reasons described above, Covad's objection to Verizon MA's motion to file supplemental testimony must be rejected. Accordingly, the Department should grant Verizon MA's motion, permit it to file supplemental testimony and adjust the existing procedural schedule to accommodate the rights of the parties.

Respectfully submitted,

VERIZON MASSACHUSETTS

Bruce P. Beausejour
185 Franklin Street, Room 1403
Boston, Massachusetts 02110-1585
(617) 743-2445

Robert N. Werlin
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110
(617) 951-1400

Dated: February 11, 2002

² Verizon MA has no objection to Covad's proposal that it be permitted to conduct discovery and file responsive testimony (Tr. 17, 3541-3542). Of course, Verizon MA must be afforded similar rights.